IN THE

Supreme Court of the United States

NO. 82-1089

THE CITY OF MARIETTA, GEORGIA
AND MAYOR AND COUNCIL OF THE
CITY OF MARIETTA, GEORGIA

Petitioners

v.

ED DILLS, d/b/a/ MID-GEORGIA
SUPPLY AND JAMES M. TUCKER

Respondents

ON WRIT OR CERTIORARI
TO THE ELEVENTH CIRCUIT
UNITED STATES COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSTION

CHARLES W. FIELD
2022 Powers Ferry Road
Suite 180
Atlanta, Georgia 30339
(404) 953-0375

Attorney for Respondents

QUESTION PRESENTED

Was the Eleventh Circuit Court of Appeals correct in affirming the lower Court decision that the ordinance in question is unconstitutional?

IN THE

Supreme Court of the United States

THE CITY OF MARIETTA, GEORGIA
AND MAYOR AND COUNCIL OF THE
CITY OF MARIETTA, GEORGIA

v.

ED DILLS, d/b/a MID-GEORGIA
SUPPLY AND JAMES M. TUCKER

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents' respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Eleventh U.S. Circuit Court of Appeals. That opinion is reported as case no. 81-7294 (Eleventh Circuit, 1982).

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STATEMENT OF THE CASE

The Respondents agree with the statement of the case as stated by the Petitioners through the first paragraph on page 7 of their Petition. At this point, the Petitioner's statement of the case greatly differs from that of the Respondents. The instant case which was originally filed by Ed Dills and James Tucker against the City of Marietta in the United States District Court for the Northern District of Georgia, Civil Action File No. C80-2001A (1981). These two individuals had at no time any connection whatsoever with any of the plaintiffs in the preceeding litigation, other than that they happened to be involved with the same industry. These plaintiffs were in no way a party to the previous litigation, nor have the Petitioners shown any connection whatsoever between these plaintiffs and Respondents herein with the preceeding litigation.

The Respondents agree with the remainder of the Petitioners' statement of the case, with the deletion of the last two paragraphs thereof.

REASONS FOR DENYING THE WRIT

I. TIME, PLACE AND MANNER RESTRICTIONS ON PURE COMMERCIAL SPEECH ARE NOT JUSTIFIED EVEN WHEN WEIGHED AGAINST THE COMMUNITY NEED FOR SAFETY REGULATION AND ASTHETIC AND ECONOMIC DEVELOPMENT, WHEN SUCH RESTRICTIONS UNFAIRLY INFRINGE UPON CITIZENS' FIRST AMENDMENT RIGHTS.

The District Court and the Eleventh Circuit Court of Appeals have both ruled that the ordinance in question is unconstitutional as violative of the Plaintiffs' First Amendment protection on commercial speech. The Court of Appeals refused to grant an en banc hearing, obviously seeing no problem with the three-judge panel's decision. The Court of Appeals was bound by the latest pronouncement from the Supreme Court in the case of *Metromedia, Inc. vs. San Diego,* 453 U.S. 413, 69 L. Ed2d 341 (1980), to the ordinance in question and held that the ordinance, in restricting the use of the signs in question, violated the Plaintiff's First Amendment rights to freely disseminate lawful commercial information that is not misleading.

In contradiction to the Petitioners' contention that the ordinance must either totally allow or totally prohibit the signs in question, the Court of Appeals merely considered the fact that the ordinance allowed the signs in question to be displayed at certain times as an attempt to avoid the ordinance being declared to be a total ban upon the signs. In fact, the ordinance amounts to a virtual ban upon the signs because of the severely restrictive term limitations.

It must be further remembered that the ordinance in question in this case is aimed at totally on-site advertising. The effect of the ordinance is, as stated above, to virtually ban this

particular type of on-site advertising. A crucial distinction to be observed is that the ordinance in *Metromedia* permitted on-site commercial advertising, and the constitutional attacks were made on the off-site commercial advertising and non-commercial billboards, both on and off-site.

At any rate it is still probably true that the *Hudson* test applies to this case. However, the Court of Appeals correctly held that the last two requirements of the *Hudson* test were not met in this case. The Court of Appeals merely held that the ordinances in question do not directly advance the City's claimed interest in traffic safety. As opposed to shackling the City's governmental powers, the decision rendered by the Courts as they stand merely state the proposition that no reason has been shown for infringing upon the Plaintiff's First Amendment rights by the virtual banning of the signs in question.

The Petitioners state the Court is confronted with a question, namely: "Are restrictions on the use of portable display signs justified for public health and safety reasons when matched against a businessman's right to disseminate commercial speech?" Respondents respectfully submit that, at least in the case at bar, the answer is not. The quite simple reason for this answer is that regardless of the claims of the City's need for restriction of these signs for public health and safety, there has been no showing whatsoever that the restriction of these signs in any enhances public health and safety.

For this reason the Writ should be denied.

II. RES JUDICATA DOES NOT BAR PLAINTIFFS SUCH AS RESPONDENTS IN THIS CASE FROM SEEKING JUDICIAL RELIEF WHEN THEY WERE NEITHER PARTIES TO NOR IN ANY WAY CONNECTED TO PREVIOUS PARTIES TO SIMILAR LITIGATION.

The District Court and the Court of Appeals held that the Plaintiffs herein are not barred from asserting their claims by

the doctrine of Res Judicata. The Petitioners completely ignore the fact that this issue has been resolved squarely against them in several cases. The Petitioners appear to be asking this Court to extend the doctrine of virtual representation to bar Plaintiffs from pursuing their case in Federal Court merely because others have preceded them in State Court litigation, even though there were absolutely no express or implied legal relationship between the parties in the two litigations. In other words, the Petitioners are asking this Court to rule that merely having a similarity of interests constitutes virtual representation. Respondents respectfully submit that this is not only an illogical result, but is directly opposite to previous holdings of this Court. See eg, *Aerojet General Corp. v. Askew*, 511 F2d 710, 717 (5th Cir. 1975), cert. denied, 428 U.S. 908, 96 S. Ct 210, 46 L.Ed2d 137 (1975).

Respectfully submitted,

CHARLES W. FIELD
Attorney for Respondents

CERTIFICATE OF SERVICE

This is to certify that I have served counsel for the Petitioners with two copies of the foregoing Respondents' Brief in Opposition by depositing said copies in the U.S. Mail with adequate postage affixed thereon, to: Roy E. Barnes, 166 Anderson Street, Marietta, Georgia 30060.

This 24th day of March, 1983.

CHARLES W. FIELD

CONCLUSION

For the reasons herein specified, it is respectfully requested that the Petition for Certiorari be denied.